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10 Attorneys for Plaintiff OPEN TEXT S.A.

11   UNITED STATES DISTRICT COURT

12   NORTHERN DISTRICT OF CALIFORNIA

13   SAN FRANCISCO DIVISION

14 OPEN TEXT S.A.,	
15 Plaintiff,	Case No. C 13-04910 JD
16 v.	
17 BOX, INC. and CARAHSOFT TECHNOLOGY CORPORATION,	**OPEN TEXT S.A.'S PROFFER OF EVIDENCE CONCERNING DAMAGES**
18 Defendants.	

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1   Pursuant to the Court's Order (Dkt. No. 500), Open Text S.A. hereby proffers the

2 evidence and testimony concerning damages it intends to offer at trial.

3 **I.   INTRODUCTION**

4   The law mandates that a patentee is entitled to no less than a reasonable royalty as

5 compensation for infringement. 35 U.S.C. § 284. Even in the event that the record does not

6 support a specific royalty estimate, "the fact finder is still required to determine what royalty is

7 supported by the record." *Apple, Inc. v. Motorola, Inc*., 757 F.3d 1286, 1327-28 (Fed. Cir. 2014)

8 citing *Dow Chem. Co. v. Mee Indus., Inc.* 341 F.3d 1370, 1381-82 (Fed. Cir. 2003) ("The statute

9 is unequivocal that the district court <u>must</u> award damages in an amount no less than a reasonable

10 royalty.") (emphasis added).

11   The Federal Circuit's recent holding in *Apple v. Motorola* is consistent with the Seventh

12 Amendment right to a jury trial when seeking damages:

13
    > In Suits at common law, where the value in controversy shall
14 > exceed twenty dollars, the right of trial by jury shall be preserved,
    > and no fact tried by a jury, shall be otherwise reexamined in any
    > Court of the United States, than according to the rules of the
15 > common law.

16 U.S. Const. amend. VII; *see also Tegal Corp. v. Tokyo Electron Am., Inc.*, 257 F.3d 1331, 1339-

17 41 (Fed. Cir. 2001) (noting right to a jury trial in patent cases in which damages are sought).

18   In the *Apple v. Motorola* case, the Federal Circuit reversed an order of summary judgment

19 of no damages granted by Judge Posner, who sat by designation as a district judge. *Apple v.*

20 *Motorola*, 757 F.3d at 1326-30. After excluding damages expert opinions, the district court

21 concluded that there was little remaining admissible damages evidence. *Id*. On that basis, the

22 district court found that the accused infringer was entitled to summary judgment that the patentee

23 was not entitled to any damages. *Id*. at 1327.

24   On appeal, the Federal Circuit determined that the district court's judgment constituted

25 reversible error. *Id*. at 1327-30. Citing the statutory mandate requiring a reasonable royalty

26 award, along with a host of precedential authority, the Federal Circuit held that the fact finder is

27 *required* to determine a reasonable royalty based on the evidence. *Id*. The Federal Circuit further

28

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Case No. C 13-04910 JD   **PROFFER OF EVIDENCE ON DAMAGES**

1 held that an award of zero damages—the effect of a court order of no damages—is *only*

2 appropriate if the evidence supports a zero-dollar damages award. *Id*. at 1328-30.

3   In this case, Open Text put forth better and more specific evidence supporting an award of

4 substantial reasonable royalties than the Federal Circuit found was sufficient to support a

5 damages award in *Apple v. Motorola*. Open Text will offer substantial evidence of a reasonable

6 royalty at trial through fact witness testimony and documentary evidence that justifies the award

7 of a reasonable royalty for Box's and Carahsoft's infringement. As this proffer demonstrates

8 below, Open Text fully disclosed its theories, documentary evidence, and witness testimony

9 supporting its damages case during discovery. Moreover, to the extent that any isolated,

10 individual pieces of evidence were not included in Open Text's lengthy discovery responses—

11 which Defendants have never challenged as deficient—it is because Defendants produced

12 thousands of financial documents in the week before the close of fact discovery and the bulk of

13 the usage information concerning the infringing Box Edit application *after* fact discovery had

14 closed. Indeed, Defendants filed a joint motion with the Court to extend the deadlines for expert

15 discovery on damages specifically because Box did not finish producing usage and download

16 information until two weeks after fact discovery closed. (Dkt. No. 269.) As confirmed in *Apple*

17 *v. Motorola*, the jury must be permitted to weigh this evidence. 757 F.3d at 1327-28; *see also*

18 U.S. Const. amend. VII; 35 § U.S.C. § 284.

19 **II. ADDITIONAL STANDARDS AND THE MODEL JURY INSTRUCTIONS**

20   There are multiple acceptable ways to determine a reasonable royalty. One approach is to

21 determine a royalty base and a percentage royalty rate. (Model Patent Jury Instructions for the

22 Northern District of California 5.7; *see also* D.I. 471-1 at 29-30[1].) This is not the only acceptable

23 approach. As this Court's Model Patent Jury Instruction 5.7 indicates, a jury can also determine a

24 reasonable royalty based on a hypothetical negotiation resulting in a fixed number of dollars per

25 units sold. *E.g.*, *Golight, Inc., v. Wal-Mart Stores, Inc.*, 355 F.3d 1327, 1338 (Fed. Cir. 2004)

26 (awarding a fixed-fee per unit royalty); *Maxwell v. Baker, Inc.*, 86 F.3d 1098, 1108-10 (Fed. Cir.

27

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28 [1] Pages as marked in the original document.

1   1996); (Model Patent Jury Instructions for the Northern District of California 5.7; *see also* D.I.

2   471-1 at 29-30.)

3   The second stipulated jury instruction in this case, which comes from the Federal Circuit

4   Bar Association Model Patent Jury Instruction B.6.7, sets forth the *Georgia-Pacific* factors that can

5   be considered and weighed by the jury in determining the reasonable royalty:

6   (1) The royalties received by the patentee for the licensing of the
             patent-in-suit, proving or tending to prove an established royalty.

7

8   (2) The rates paid by the licensee for the use of other patents
             comparable to the patent-in-suit.

9   (3) The nature and scope of the license, as exclusive or
             nonexclusive, or as restricted or nonrestricted in terms of territory
10   or with respect to whom the manufactured product may be sold.

11   (4) The licensor's established policy and marketing program to
             maintain his or her patent monopoly by not licensing others to use
12   the invention or by granting licenses under special conditions
             designed to preserve that monopoly.

13

14   (5) The commercial relationship between the licensor and licensee,
             such as whether they are competitors in the same territory in the
             same line of business, or whether they are inventor and promoter.

15

16   (6) The effect of selling the patented specialty in promoting sales of
             other products, features, or services of the licensee, the existing
17   value of the invention to the licensor as a generator of sales of his
             nonpatented items, and the extent of such derivative or convoyed
             sales.

18

19   (7) The duration of the patent and the term of the license.

20   (8) The established profitability of the product made under the
             patents, its commercial success, and its current popularity.

21   (9) The utility and advantages of the patented property over the old
             modes or devices, if any, that had been used for working out similar
22   results.

23   (10) The nature of the patented invention, the character of the
             commercial embodiment of it as owned and produced by the
24   licensor, and the benefits to those who have used the invention.

25   (11) The extent to which the infringer has made use of the invention
             and any evidence probative of the value of that use.

26

27   (12) The portion of the profit or of the selling price that may be
             customary in the particular business or in comparable business to
             allow for the use of the invention or analogous inventions.

28

(13) The portion of the realizable profits that should be credited to the invention as distinguished from nonpatented elements, the manufacturing process, business risks, or significant features or improvements added by the infringer.

(14) The opinion and testimony of qualified experts.

(15) The amount that a licensor (such as the patentee) and a licensee (such as the infringer) would have agreed upon (at the time the infringement began) if both had been reasonably and voluntarily trying to reach an agreement; that is, the amount which a prudent licensee—who desired, as a business proposition, to obtain a license to manufacture and sell a particular article embodying the patented invention—would have been willing to pay as a royalty and yet be able to make a reasonable profit and which amount would have been acceptable by a prudent patentee who was willing to grant a license.

No one factor is dispositive and you can and should consider the evidence that has been presented to you in this case on each of these factors. You may also consider any other factors which in your mind would have increased or decreased the royalty the infringer would have been willing to pay and the patent holder would have been willing to accept, acting as normally prudent business people. The final factor establishes the framework which you should use in determining a reasonable royalty, that is, the payment that would have resulted from a negotiation between the patent holder and the infringer taking place at a time prior to when the infringement began.

(D.I. 471-1 at 31-32 (citations omitted)); *see also Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970).)

Expert testimony is not required to support an award of damages. *Dow Chem. Co. v. Mee Indus., Inc.* 341 F.3d 1370, 1381-82 (Fed. Cir. 2003); 35 U.S.C. § 284 ("The court <u>may</u> receive expert testimony as an aid to the determination of damages or of what royalty would be reasonable under the circumstances.") (emphasis added); *see also Annotated Patent Digest*, § 44:79 ("The use of expert testimony is permissive. Thus, if a patentee's damage expert is excluded, that fact does not automatically deny a patentee a right to recover damages."); 7 Donald S. Chisum, Chisum on Patents § 20.07[3][a] (2011).

1

III.   **BACKGROUND**

2

A.   Open Text Timely Disclosed Its Damages Theories and Evidence

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In compliance with the Federal Rules of Civil Procedure and the Court's Scheduling

4

Order, Open Text disclosed its damages theories and evidence during fact and expert discovery.[2]

5

Through its fulsome discovery responses, Open Text put Defendants on notice of its infringement

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theories and evidence months ago, and even without a damages expert to testify at trial, Open

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Text has more than enough evidence to present a compelling damages case.

8

1.   Open Text Timely Served Responses to Interrogatories on Damages

9

During the fact discovery phase of this case, Defendants served multiple interrogatories

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relating to damages, including Interrogatory Nos. 6, 8(a), 13, and 18, which are discussed below

11

and attached to this proffer. Open Text provided multiple supplemental responses to Defendants'

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interrogatories, including extensive responses in mid-September 2014—nearly a month before the

13

close of discovery and before Defendants took depositions of Open Text's witnesses. In those

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interrogatory responses, Open Text identified specific documentary and witness evidence

15

supporting its damages theory. (Armon Decl., Ex. 4, Pl.'s Supp. Resp. to Interrogs. at 15-56.)

16

Open Text tied that evidence to the elements of its theories. (*Id*.)

17

At the close of fact discovery on October 15, 2014, Open Text again supplemented its

18

responses to include additional evidence that it uncovered since serving its prior supplemental

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responses. (Ex. 15, Pl.'s Supp. Resp. to Interrogs. at 15-73.)[3]

20

Defendants never challenged the sufficiency of those responses with the Court. Notably,

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in his November 18, 2014 Rebuttal Report, Defendants' expert Dr. Leonard indicates that he

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considered Open Text's supplemental interrogatory responses, including the September 24, 2014

23

responses. (Ex. 18, Leonard Report, at 18, 35-36, 38-40, 50, 131, 135.) And, given that Dr.

24

Leonard had extra time to submit his written opinion due to Defendants' late production of

25

26

_____

[2] Open Text provides specific details relating to its proffered evidence in context of its theory in Section IV, below.

27

[3] All exhibits are attached to the Declaration of Orion Armon that is being filed simultaneously

28

with this proffer.

damages data, he also had ample opportunity to consider the October 15, 2014 supplement. (D.I. 271; *see also* D.I. 267.)

2.   Documents

Open Text produced many documents relevant to Open Text's disclosed damages theory, including evidence of the value that would be taken into consideration at the time of the hypothetical negotiation. Open Text identified the evidence in its interrogatory responses for each aspect of its theory. (Ex. 4, Pl.'s Supp. Resp. to Interrogs. at 18-23.)

Defendants' produced documents are also relevant to Open Text's damages case, as explained by Open Text in its discovery responses. (Ex. 4, Pl.'s Supp. Resp. to Interrogs.) Some of the most important damages evidence—usage data for the accused features—was not produced by Defendants until after the close of discovery. (Ex Nos. 19-20.) Defendants finally agreed to produce the materials after months of Open Text requests and a filing by Open Text with the Court. (D.I. 267.)

IV.   IDENTIFICATION OF WITNESSES AND EVIDENCE OPEN TEXT WILL RELY UPON TO PROVE DAMAGES

A.   Concise List of Witnesses Open Text Relies On and Dates Disclosed

Open Text intends to rely on the testimony of the following witnesses to prove damages. Each of these witnesses was identified in Open Text's Initial Disclosures served on February 21, 2014, excerpts of which are reproduced below. (Ex. 1, Pl.'s Initial Disclosures.) Open Text plans to call each of these witnesses to testify at trial:

Name/Title	Contact Information	Subject Areas
Nicholas Carter, Senior Director of IP and Product Management for ECM at Open Text S.A.	Open Text S.A. c/o Cooley LLP 380 Interlocken Crescent, Suite 900 Broomfield, Colorado 80021 (720) 566-4000	Likely to have discoverable information concerning the ownership of the Patents-in-Suit, damages, irreparable harm, Open Text S.A.'s business structure and products, product development and offerings, and competition.
Adam Howatson, Vice President, Products at Open Text Corp.	Open Text Corporation c/o Cooley LLP 380 Interlocken Crescent, Suite 900	Likely to have discoverable information concerning the development, design, and sale of Open Text Corp./Inc.'s

	Broomfield, Colorado 80021 (720) 566-4000	products.
Aaron Levie, CEO	Box, Inc.	Likely to have discoverable information concerning Box business strategy, competition, damages, and accused products
Dylan Smith, CFO	Box, Inc.	Likely to have discoverable information concerning Box business strategy and finances
Chris Yeh, SVP Platform and Product	Box, Inc.	Likely to have discoverable information concerning Box products, development, and operation
Whitney Bouck, SVP Global Marketing and GM Enterprise	Box, Inc.	Likely to have discoverable information concerning Box business strategy, marketing, sales and product development
Griffin Dorman, Product Manager	Box, Inc.	Likely to have discoverable information concerning Box business strategy, competition, damages, and accused products
Sebastien Lemenager, Senior Manager of Business Analytics	Box, Inc.	Likely to have discoverable information concerning Box business strategy, competition, damages, and accused products
Hilary Salazar, Group Product Marketing Manager	Box, Inc.	Likely to have discoverable information concerning Box business strategy, competition, damages, and accused products
Grant Shirk, Group Product Marketing Manager	Box, Inc.	Likely to have discoverable information concerning Box business strategy, competition, damages, and accused products

Open Text has issued subpoenas to a significant number of defense witnesses to appear at trial, including nearly every one of the Box witnesses identified in the tables immediately above and below. (Exs. 22-30, Trial Subpoenas.)

Case No. C 13-04910 JD   7.   **PROFFER OF EVIDENCE ON DAMAGES**

1   Open Text intends to rely on the testimony of the following witnesses to prove damages.

2 Each of these witnesses was identified in Open Text's Supplemental Initial Disclosures served on

3 August 5, 2014, excerpts of which are reproduced below. (Ex. 2, Pl.'s Suppl. Initial Disclosures.)

4 Open Text plans to call each of these witnesses to testify at trial:

5

Name/Title	Contact Information	Subject Areas
Sam Ghods	Box, Inc.	Likely to have discoverable information concerning Box accused products and Box's patents or patent applications
Brandon Savage	Box, Inc.	Likely to have discoverable information concerning Box accused products and Box's patents or patent applications

11   Open Text intends to rely on the testimony of the following witnesses to prove damages.

12 Each of these witnesses was identified in Open Text's Second Supplemental Initial Disclosures

13 served on September 19, 2014, excerpts of which are reproduced below. (Ex. 3, 2d Pl.'s Suppl.

14 Initial Disclosures.) Open Text intends to call Mr. Unruh to testify at trial regarding damages

15 issues.

16

Name/Title	Contact Information	Subject Areas
Trevor Unruh Assistant General Counsel	Open Text Corp. c/o Cooley LLP 380 Interlocken Crescent, Suite 900 Broomfield, Colorado 80021 (720) 566-4000	Likely has discoverable information concerning licensing of certain Patents-in-Suit
Jeff Mannie VP, Controller and CAO	Box, Inc.	Likely to have discoverable information concerning Box business strategy and finances
Ed Tang	Box, Inc.	Likely to have discoverable information concerning Box business strategy and finances

1

2

3

1.   Open Text Identified Its Key Damages Witnesses In Its Interrogatory Responses Served On September 24, 2014, and Box Took the Deposition of Each Witness

4   Open Text intends to call each of the following key witnesses to testify live at trial. Each

5   was specifically disclosed in Open Text's response to Box's Interrogatory No. 6 as supporting its

6   damages case, and after service of Open Text's interrogatory response, Box took the deposition of

7   each witness:

8   • Adam Howatson, Vice President, Products, at Open Text Corp.

9   • Trevor Unruh, Assistant General Counsel, Open Text Corp.

10   • Nic Carter, Senior Director of IP and Product Management for ECM at Open Text

11   S.A.

12   (Ex. 4, Pl.'s Supp. Resp. to Interrogs. at 15.)

13

14

2.   Open Text Designated the Testimony of Key Box and Carahsoft Witnesses, Which it Will Present at Trial

15   Open Text designated the testimony of the following Box and Carahsoft witnesses for

16   presentation at trial in accordance with the Court's rules on pre-trial disclosures. The testimony

17   and exhibits related to these witnesses supports Open Text's proof of damages for Box and

18   Carahsoft:

19   • Kelly Bray, Director of Renewals and Sales Development, Box, Inc., August 27,

20   2014 (Ex. 5, Depo. Designation at 5:10-5:12; 5:25-6:16; 6:21-7:02; 30:11-31:01;

21   31:03-32:21; 78:06-78:11; 78:20-79:11; 79:21-79:24; 80:02-81:24; 97:02-99:05;

22   101:25-105:09.)

23   • Craig P. Abod, President of Carahsoft, October 2, 2014 (Ex. 6 and 7.)

24   • Matthew Rattigan, Carahsoft Sales Associate, October 3, 2014 (Ex. 8.)

25   • Jennifer Ceran, VP Finance, Box, Inc., September 17, 2014 (Ex. 9, Depo.

26   Designation at 5:07-5:21; 6:18-6:22; 7:10-8:04; 9:04-9:09; 13:01-17:17; 25:11-

27   25:20; 50:04-50:18; 55:14-56:07; 56:09-56:15; 56:17-56:19; 56:21-57:18.)

28   • Zai Divecha, Former Associate Customer Programs Manager, Box, Inc., October

14, 2014 (Ex. 10, Depo. Designation at 7:10-7:11; 8:03-8:07; 37:1-41:06.)

- Ivan Galea, Senior Director Business Analytics, Box, Inc., October 15, 2014 (Ex. 11, Depo. Designation at 5:10-5:21; 6:06-6:17; 8:05-8:14; 8:16-9:11; 9:16-10:03; 10:05; 10:07-10:11; 10:13-10:15; 10:25-11:03; 11:05-11:12; 14:22-14:25; 15:02-15:03; 15:05-15:15; 15:17-15:21; 15:23-16:06; 16:21-16:23; 16:25.)

- Jeff Mannie, VP Controller and Chief Accounting Officer, Box, Inc., October 13, 2014 (Ex. 12, Depo. Designation at 5:11-5:17; 6:13-6:14; 6:20-6:25; 7:16-7:18; 49:09-49:18; 57:06-57:23; 57:25-58:06; 57:25-58:06; 58:25-59:22; 59:24-60:03; 79:24-80:01; 80:03-81:24; 82:01-82:18; 82:21-83:09; 83:21-84:02; 84:04-84:25; 85:02-85:18.)

- Peter McGoff, General Counsel, Box, Inc., October 13, 2014 (Ex. 13, Depo. Designation at 7:14-8:04; 8:15-8:23; 9:14-9:21; 9:23-10:18; 10:20-11:01; 11:03-11:11; 11:13-11:22; 11:24-12:09; 12:11-12:24; 13:06-14:01; 17:10-19:01.)

B.   Open Text's Interrogatory Response on July 7, 2014 Identified Evidence of Direct Competition Between the Parties

On July 7, 2014, Open Text responded to Interrogatory Nos. 8(a) and 13 by identifying evidence that Box and Open Text directly compete in the off-premise, large company document management market and that Open Text is harmed by Box's competition. (Ex. 14, Pl.'s Resp. to Interrogs. at 12-13 and 21-24.)

On September 24, 2014, Open Text supplemented its response to Interrogatory No. 8(a) to identify additional evidence of competition and harm. (Ex. 4, Pl.'s Supp. Resp. to Interrogs. at 1-14 at 57-59.)

On October 15, 2014, Open Text provided a second supplemental response to Interrogatory No. 8(a) that provided even more evidence of competition and harm. (Ex. 15, Pl.'s Supp. Resp. to Interrogs. at 74-76.)

The following trial exhibits cited in response to Interrogatory 8(a) are relevant to Open Text's damages:

TX	DESCRIPTION

COOLEY LLP
ATTORNEYS AT LAW
SAN FRANCISCO

TX	DESCRIPTION
20	Open Text Competitive Notes (BOX1071320) (Salazar Depo Ex. 20)
23	Power Point - Project Frenemy – Box + MSFT (BOX0443060 – BOX0443088) (Salazar Depo Ex. 23)
24	Power Point - Box Cloud Connect – Sales Training, dated 9/13 (BOX0000441 – BOX0000468) (Salazar Depo Ex. 24)
263	Box Corporate Pitch (External) (BOX0000246 – BOX0000394)
273	M. Krasner email re: Win Notification – Jazz Pharmaceuticals – Company Wide – 3 Year Term - $346 TCV (BOXEM_LEVIE_0000735- BOXEM_LEVIE_0000737)
293	Box: Enhance Your ECM Investments with the Cloud (BOX0015590 – BOX0015591)
304	Qualification of SMB Stickiness (BOX0432691)
312	Power Point - Cloud EIM (OTEX200108610 – OTEX200108629)
313	Power Point - ECM Response to SharePoint/Box/Huddle, dated 8/6/12 (OTEX200112266 – OTEX200112289)
314	9/30/14 Press Release – To Beat Competitors Box is Getting More Business Specific (OTEX200113111 – OTEX200113113)
316	Spreadsheet - Pricing Plans_Analysis (BOX0035522)
347	Power Point - Nimbus Proposal Preview, (OTEX200109738 – OTEX200109758)
348	A. Levie email re: Box/SAP (BOXEM_LEVIE_0005466- BOXEM_LEVIE_0005467)
349	Power Point - Project Nimbus Overview (OTEX200109800 – OTEX200109811)
351	M. Twitty email re: Motorola (Request to Send Email to Eduardo) (BOXEM_LEVIE_0002810)
418	J. Das Email re: Box/SAP (BOXEM_LEVIE_0000797)
419	Power Point - SAP Solution Extensions by Open Text, ECM for SAP (OTEX000924427 – OTEX000924458)
426	SAP Solution Brief - Document and Data Management for SAP Solutions (OTEX000206425 – OTEX000206428)
427	Power Point - IXOS for SAP FI Improving Efficiencies with Accounts Payable & Receivable (OTEX000935728 – OTEX000935788)
428	Power Point - Project Nimbus Overview and Plan, (OTEX200109824 – OTEX200109847)
432	Tempo in a Box Campaign Plan (OTEX000228130 – OTEX000228132)
449	Power Point - Project Frenemy (BOX0443115 – BOX0443127)
450	A. Levie email Box/SAP (BOXEM_LEVIE_0000986- BOXEM_LEVIE_0000987)
451	R. Branitzky email re: Box/SAP (BOXEM_LEVIE_0003154- BOXEM_LEVIE_0003155)
452	M. Twitty email re: Motorola Request to Send Email to Eduardo) (BOXEM_LEVIE_0004194- BOXEM_LEVIE_0004195)
453	A. Levie email re: Box/SAP (BOXEM_LEVIE_0004287)
454	K. Towe email re: Win Notification – Pioneer Electronics (USA) Inc. – Platform – Car Audio Dept (BOXEM_LEVIE_0004901- BOXEM_LEVIE_0004902)
455	J. Chen email re: Motorola (Request to Send Email to Eduardo) (BOXEM_LEVIE_0006079- BOXEM_LEVIE_0006080)
456	J. Das email re: Box Dec Board Meeting (BOXEM_LEVIE_0006270- BOXEM_LEVIE_0006271)
457	E. Blevins email re: Win Notification – Pioneer Electronics (USA) Inc. – Platform – Car Audio Dept (BOXEM_LEVIE_0007315- BOXEM_LEVIE_0007317)
482	Email from A. Levie re: Box/SAP (BOXEM_LEVIE_0002388 –

TX	DESCRIPTION
	BOXEM_LEVIE_0002389)
1812	Report: Price Proposal for Nimbus, Bates OTEX200109160-9175 (Howatson Depo Ex. 1812)

The following trial exhibits cited in response to Interrogatory 13 are relevant to Open Text's damages:

TX	DESCRIPTION
22	Spreadsheet - Feature Request Salesforce Report, dated 5/14/14 (BOX0032194) (Salazar Depo Ex. 22)
24	Power Point - Box Cloud Connect – Sales Training, dated 9/13 (BOX0000441 – BOX0000468) (Salazar Depo Ex. 24
25	Power Point – ECM Connector Strategy, dated 7/13 (BOX0015844 – BOX0015860) (Salazar Depo Ex. 25)
176	Spreadsheet - Bulk import for RefStor Q1 2013 - Customer Stories (BOX0521799) (Divecha Depo Ex. 176
263	Box Corporate Pitch (External) (BOX0000246 – BOX0000394)
293	Box: Enhance Your ECM Investments with the Cloud (BOX0015590 – BOX0015591)
316	Spreadsheet - Pricing Plans_Analysis (OTEX0000762382)

C. Open Text's Interrogatory Response on September 24, 2014 Provided a 42-Page, Comprehensive Disclosure of its Evidence of Damages

On September 24, 2014, Open Text supplemented its response to Interrogatory No. 6 with a 42-page interrogatory response that identified the witnesses and evidence supporting its damages case. (Ex. 4, Pl.'s Supp. Resp. to Interrogs. at 14-56.) Open Text's interrogatory response notified Box that Open Text is entitled to a reasonable royalty and provided a disclosure of evidence pertinent to each of the 15 *Georgia-Pacific* factors.

Open Text supplemented its response to Interrogatory No. 6 on October 15, 2014 by adding 17 pages of additional citations to evidence relevant to each of the 15 *Georgia-Pacific* factors, the parties' negotiating positions, and Open Text's damages. (Ex. 15, Pl.'s Supp. Resp. to Interrogs. at 14-73.)

The following trial exhibits are cited in Open Text's response to Interrogatory No. 6 and relevant to Open Text's damages:

TX	DESCRIPTION

TX	DESCRIPTION
7	Box Edit Release Information (BOX0013465 – BOX0013469) (Zamora Depo Ex. 7)
11	US SEC Amendment No. 1 to Form S-1 Registration Form for Box Inc., (BOX1071600 – BOX1071814) (Salazar Depo Ex. 11)
12	Power Point – Competitive 101 (BOX0027275 – BOX0027301) (Salazar Depo Ex. 12)
13	Power Point – Sales Manager Training – MSFT Competitive & Pricing Strategies (BOX0000536 – BOX0000549) (Salazar Depo Ex. 13)
14	Power Point - Platform Pricing- Internal Launch Deck (BOX0035910 – BOX0035949) (Salazar Depo Ex. 14)
15	Power Point – 5.27.14 Competitive eStaff Update (BOX0444207 – BOX0444232) (Salazar Depo Ex. 15)
16	SharePoint & Box – Battle Card, dated 11/13/13 (BOX0026961 – BOX0026965) (Salazar Depo Ex. 16)
17	Alfresco v. Box Battle Card, dated 3/2/14 (BOX0282473 – BOX0282477) (Salazar Depo Ex. 17)
18	Box vs. One Drive (BOX0026761) (Salazar Depo Ex. 18)
19	Power Point – Inside Sales: Competitive Playbook (BOX0160536 – BOX0160540) (Salazar Depo Ex. 19)
20	Open Text Competitive Notes (BOX1071320) (Salazar Depo Ex. 20)
21	Spreadsheet - Content Management RFI Template w Box Answers (BOX0032171) (Salazar Depo Ex. 21)
22	Spreadsheet - Feature Request Salesforce Report, dated 5/14/14 (BOX0032194) (Salazar Depo Ex. 22)
23	Power Point - Project Frenemy – Box + MSFT (BOX0443060 – BOX0443088) (Salazar Depo Ex. 23)
24	Power Point - Box Cloud Connect – Sales Training, dated 9/13 (BOX0000441 – BOX0000468) (Salazar Depo Ex. 24)
25	Power Point – ECM Connector Strategy, dated 7/13 (BOX0015844 – BOX0015860) (Salazar Depo Ex. 25)
32	Market Overview: Secure Collaboration Questionnaire (BOX0663563 – BOX0663590) (Urton Depo Ex. 32)
34	Features/functionality that exemplifies and/or differentiates your cloud file sharing products (BOX0664493 – BOX0664496) (Urton Depo Ex. 34)
41	Forrester Report – Document Collaboration Vendor Landscape, dated 5/30/13 (BOX0192173 – BOX0192194) (Urton Depo Ex. 41)
47	Spreadsheet - Q4 Upsell Targets – Corporate (BOX0666402) (Bray Depo Ex. 47)
48	Spreadsheet - Churn Report 2H 2010 data 1.31.11 (BOX0277160) (Bray Depo Ex. 48)
51	Power Point – Box Product Updates, dated 8/12 (BOX0425599 – BOX0425624) (Bray Depo Ex. 51)
52	Spreadsheet - ending TAV businesses and seats by segment (BOX0438060) (Lemenager Depo Ex. 52)
53	Spreadsheet - Net Retention Breakdown (BOX0429484) (Lemenager Depo. Ex. 53)
54	Spreadsheet – Free-Users-Historical (BOX0037957) (Lemenager Depo Ex. 54)
56	Spreadsheet - The Atlas – April 6, 2014 (BOX0029592) (Lemenager Depo Ex. 56)
57	Spreadsheet - New Data Model - Current tables (old version (BOX0435821) (Lemenager Depo Ex. 57)

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Case No. C 13-04910 JD   13.   **PROFFER OF EVIDENCE ON DAMAGES**

TX	DESCRIPTION
60	Spreadsheet - Enterprise Acct Analysis (supporting_analyses_for_pi.) (BOX0438390) (Lemenager Depo Ex. 60)
64	Spreadsheet – Backup_32K Paying Businesses (BOX0429505) (Lemenager Depo Ex. 64)
123	Email re: Brainstorm Open In Desktop from the Web Strategy, dated 6/22/11 (BOX0015248 – BOX0015249) (Savage Depo Ex. 123)
124	Email re: Update on Open on Desktop, dated 7/1/11 (BOX0015250 – BOX0015251) (Savage Depo Ex. 124)
125	Open On Desktop PRD (BOX0564275 – BOX0564283) (Savage Depo Ex. 125)
166	Spreadsheet – Box Financials (BOX1087348) (Mannie Depo Ex. 166)
172	Customer Statistics – January 2013 (BOX0029478) (Divecha Depo Ex. 172)
174	Enterprise Strategy Group – Economic Value Validation Box Online File Sharing & Collaboration for Enterprise IT (BOX0033341 – BOX0033367) (Divecha Depo Ex. 174)
175	Power Point – CIO Collaboration Tools and Solutions CIO/CSO Market Pulse Survey for Box.net, dated 10/11 (BOX0137744 – BOX0137765) (Divecha Depo Ex. 175)
176	Spreadsheet - Bulk import for RefStor Q1 2013 - Customer Stories (BOX0521799) (Divecha Depo Ex. 176)
179	Spreadsheet – Users Installed on Windows Sync vs. Mac Sync (BOX1087347) (Lemenager Depo Ex. 179)
180	The Atlas: Overview, Bates BOX0029576 (Lemenager Depo Ex. 180)
180	Spreadsheet - The Atlas – December 15, 2013 (BOX0029576) (Lemenager Depo Ex. 180)
182	Spreadsheet – Actions Across Box Users Per Month (BOX1087344) 178 – (Lemenager Depo Ex. 178) 182 – (Galea Depo Ex. 182)
183	Salesforce Feature Requests 031113 (BOX0613719) (Galea Depo Ex. 183)
184	Spreadsheet - Dashboard Dictionary (BOX0727379) (Lemenager Depo Ex. 58) (Galea Depo Previously Marked Ex. 184)
213	M. Self email re: Box Edit Usage (BOXEM_SAVAGE_0007259)
216	Power Point – UserExperience (BOX0427057 – BOX0427077)
217	Project Vulcan Q1 Plans (BOX0564284 – BOX0564285)
218	Box Edit Blog Post – Box Edit with Auto-Updated Means Easier File Editing, Forever (BOX0418578 – BOX0418580) (OTEX200247739 – OTEX200247748) (LEONARD0000271 – LEONARD0000280)
219	Top 50 Apps by Users (yesterday) (BOX0654677)
220	Power Point - Drinking Our Own Champagne (BOX0014982 – BOX0015018)
221	Power Point - Box Product Roadmap – Updated Q2 2014 (BOX0178434 – BOX0178502)
222	B. Savage email re: [Gartner PCC] Trip Report – Key Observations from the event (BOXEM_DORMAN_0018970 – BOXEM_DORMAN_0018974)

TX	DESCRIPTION
223	Box Financial Results Summary 2014 (BOX0438238 – BOX0438246)
250	Spreadsheet – OT Logins (BOX1087345)
251	Spreadsheet – Product actions per account (09.17.14) (BOX1087346)
252	Spreadsheet – Actions across box users per month (BOX1087351)
255	IBM and Open Text – License Agreement (OTEX004245873 – OTEX004245891)
257	G. Dorman email re: Voice of the Customer: Box Edit (BOXEM_SAVAGE_0009842 – BOXEM_SAVAGE_0009844)
262	Alfresco Settlement Agreement with Open Text S.A., dated 9/29/2014(OTEX200229709 – OTEX200229720)
263	Box Corporate Pitch (External) (BOX0000246 – BOX0000394)
268	Freemium in the Enterprise – One Year Later (BOX0214191 – BOX0214193)
270	Power Point - Box Business and Financial Update, dated 8/14 (BOX1075965 – BOX1076002)
271	Power Point - The Freemium Imperative (BOX1077502 – BOX1077523)
272	Operation Scorched Earth: How Box is Going to Win (BOX1078768 – BOX107877)
288	Spreadsheet – Top 100 Customers, dated 5/27/14 (BOX0730284)
292	Box Edit on Client Machine (BOX0013458 – BOX0013460)
293	Box: Enhance Your ECM Investments with the Cloud (BOX0015590 – BOX0015591)
294	Power Point - Intapp Box Builder – Connecting ECMs with Box (BOX0015871 – BOX0015886)
295	Power Point - AR Stats – 2014 Predicts (BOX0016508 – BOX0016528)
296	Power Point - Platform Rising (BOX0035981 – BOX0036025)
297	Power Point - Competitive 101 (BOX0146453 – BOX0146491)
298	Power Point - Forrester – Making Leaders Successful Every Day (BOX0178581 – BOX0178599)
299	Innovation at Box: Product Release Timeline (BOX0285467 – BOX0285471)
300	Power Point – BoxDev14 (BOX0286285 – BOX0286398)
301	ECM Cloud Connect Qualifying Questions (BOX0546696 – BOX0546697)
302	Get more out of box (BOX0342344)
304	Qualification of SMB Stickiness (BOX0432691)
305	Power Point – Really Big Deals at Box (BOX0449553 – BOX0449567)
306	New - Pricing Comparison Elite (External) (BOX0453104 – BOX0453105)
307	Power Point - Box Desktop, dated 9/13 (BOX0459227 – BOX0459232)
308	Box Messaging and Positioning Questionnaire Chart (BOX0508810 – BOX0508814)
309	Power Point - Project Palantir, dated 9/19/13 (BOX0744664 – BOX0744717)

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TX	DESCRIPTION
310	Creating a Market Category for Box (BOX0748920 – BOX0748926)
311	EntrophySoft – Open Text eDocs DM Connector Guide 4.5.43 (BOX0749725 – BOX0749735)
312	Power Point - Cloud EIM (OTEX200108610 – OTEX200108629)
313	Power Point - ECM Response to SharePoint/Box/Huddle, dated 8/6/12 (OTEX200112266 – OTEX200112289)
315	PowerPoint - Enterprise Connect Technical Overview, dated 4/29/10 (OTEX003697548 – OTEX003697584)
317	Globant – IT Professional Services Amendment #07 - SOW #01 re Box Edit (BOX0013530 – BOX0013535)
323	Box.net Financial Statements With Report of Independent Certified Public Accountants, December 31, 2008 and 2007 (BOX0034376 – BOX0034397)
330	Spreadsheet titled The Atlas (2014-02-16).xlsx
344	C. Yeh email re: Product Update for August (BOXEM_LEVIE_0014388-BOXEM_LEVIE_0014399)
345	Box Edit Usage - Greenfield Active Users (BOX0453089 – BOX0453090)
346	Power Point - Price Proposal for Nimbus (OTEX200109160 – OTEX200109175)
347	Power Point - Nimbus Proposal Preview, (OTEX200109738 – OTEX200109758)
348	A. Levie email re: Box/SAP (BOXEM_LEVIE_0005466- BOXEM_LEVIE_0005467)
349	Power Point - Project Nimbus Overview (OTEX200109800 – OTEX200109811)
350	Certified File Wrapper for U.S. Patent Application No. 14/046,726 (OTEX200244017 – OTEX200246651) Excerpt
351	M. Twitty email re: Motorola (Request to Send Email to Eduardo) (BOXEM_LEVIE_0002810)
352	Certified Patent Application No. 61/554,450, dated 11/1/11 (OTEX200246758 – OTEX200246771)
353	Internal Only - Active Users (BOX0453084 – BOX0453085)
359	Certified File Application No. 61/709,407, dated 10/4/12 (OTEX200246867 – OTEX200246938
360	Patent Application No. 61/641,824, dated 5/2/12 (OTEX200104954 – OTEX200104984)
361	Certified Patent Application No. 61/668,626, dated 7/6/12 (OTEX200246827 – OTEX200246838
368	AirWatch vs. Box – Battle Card , (BOX0026454 – BOX0026458)
369	YouSendIt vs. Box – Battle Card, (BOX0026716 – BOX0026721)
370	IDC Link BoxWorks 2012, BOXing Above its Weight Into the Enterprise (BOX0046293 – BOX0046295)
371	Dylan Smith CFO Presentation Script (BOX0662068 – BOX0662072)
375	Spreadsheet – Answers (43) (BOX0032920)
382	Power Point - Box Competitive Intelligence Program (BOX0444181 – BOX0444206)
383	Power Point – 8.14.13 EMEA Competitive Training (BOX0451293 – BOX0451321)
384	Power Point – 8.6.13 Competitive 201 (BOX0161563 – BOX0161592)
385	Spreadsheet - Sync Feature Requests - 2013 (BOX0610400)
386	Spreadsheet - Sync Beta Requests Round 1 (BOX0791120)
390	Spreadsheet - Livelink Enterprise Server Package Feature Matrix (OTEX002346046)
391	Q1 FY2015 Earnings Script (BOX0662038 – BOX0662040)
392	Forbes Article – "How the Kids at Box are Disrupting Software's Most Lucrative Game" (BOX0286906 – BOX0286912)

TX	DESCRIPTION
393	Power Point - Box Pricing Updates: The Why, How, and When, (BOX0037657-BOX0037696)
394	Power Point – Path to Profitability, (BOX1087361 – BOX1087382)
396	D. Smith email re: Box Mezzanine Deck V0 + Status (BOXEM_LEVIE_0020183 – BOXEM_LEVIE_0020186)
402	Power Point – Box.net Series B (BOX0032133 – BOX0032146)
406	Power Point – Pricing Strategy 2.0, (BOX0195385 – BOX0195410)
407	The Atlas, (BOX0029585)
408	The Atlas, (BOX0029586)
409	The Atlas, (BOX0029587)
410	The Atlas, (BOX0029588)
411	The Atlas, (BOX0029589)
412	The Atlas, (BOX0029590)
413	The Atlas, (BOX0029591)
417	Open Text – Reactive Statement (BOX0286129)
418	J. Das Email re: Box/SAP (BOXEM_LEVIE_0000797)
419	Power Point - SAP Solution Extensions by Open Text, ECM for SAP (OTEX000924427 – OTEX000924458)
420	Power Point – Hitting the Boardwalk and Park Place, Box Pricing Training 301, (BOX0284094 – BOX0284117)
421	EntrophySoft - Vignette Content Management Connector Guide (BOX0750326 – BOX0750347)
422	Competitive for S-1 – Redlined (BOX0733880 – BOX0733881)
423	Competitive for S-1_v2 (BOX0733882 – BOX0733883)
424	Power Point - Show me the Money: Box Pricing 101, (BOX0037765 – BOX0037796)
426	SAP Solution Brief - Document and Data Management for SAP Solutions (OTEX000206425 – OTEX000206428)
427	Power Point - IXOS for SAP FI Improving Efficiencies with Accounts Payable & Receivable (OTEX000935728 – OTEX000935788)
428	Power Point - Project Nimbus Overview and Plan, (OTEX200109824 – OTEX200109847)
429	Power Point - One IT BT Livelink Explorer Workshop (OTEX000403038 – OTEX000403048)
430	Livelink ECM – WebDAV Installation and Administration Guide (OTEX000383205 – OTEX000383304)
431	Feature Matrix – Livelink Enterprise Server Solutions, (OTEX000348740 – OTEX000348750)
432	Tempo in a Box Campaign Plan (OTEX000228130 – OTEX000228132)
433	Power Point - Open Text Tempo Pricing – Overview for Sales, (OTEX005004811 – OTEX005004820)
435	Open Text Enterprise Connect and Office Editor Release notes (OTEX004514682 – OTEX004514706)
436	Power Point - Enterprise Connect Overview & Desktop Migration (OTEX004476987 – OTEX004477019)
437	PowerPoint - Enterprise Connect Technical Overview, (OTEX003697548 – OTEX003697584)
438	Livelink ECM Package Feature Matrix, (OTEX003513112)
439	Livelink ECM Package Feature Matrix, (OTEX003444735)
440	User Sales Order Forms (OTEX003390375 – OTEX003390385)
441	Livelink ECM – Office Editor MSI 3.2.0 Release Notes, (OTEX003323633 – OTEX003323635)

TX	DESCRIPTION
442	Spreadsheet - Livelink Package Maintenance Revenue Breakdown & Royalty Calculations v3.0, (OTEX002199600)
443	Spreadsheet - Livelink Package Revenue Breakdown & Royalty Calculations v2.0, (OTEX001527800)
444	Spreadsheet - Livelink ECM Package Feature Matrix (OTEX001157438)
445	Spreadsheet - Livelink ECM Package Feature Matrix, (OTEX001061038)
446	A Comparison of Livelink WebDAV, LL Explorer and Edit-Compose Functionality (OTEX001022311 – OTEX001022320)
447	WebDAV vs Livelink Explorer (OTEX001022271 – OTEX001022281)
448	Power Point - Livelink Explorer Product Presentation, (OTEX000789835 – OTEX000789903)
449	Power Point - Project Frenemy (BOX0443115 – BOX0443127)
450	A. Levie email Box/SAP (BOXEM_LEVIE_0000986- BOXEM_LEVIE_0000987)
451	R. Branitzky email re: Box/SAP (BOXEM_LEVIE_0003154- BOXEM_LEVIE_0003155)
452	M. Twitty email re: Motorola Request to Send Email to Eduardo) (BOXEM_LEVIE_0004194- BOXEM_LEVIE_0004195)
453	A. Levie email re: Box/SAP (BOXEM_LEVIE_0004287)
455	J. Chen email re: Motorola (Request to Send Email to Eduardo) (BOXEM_LEVIE_0006079- BOXEM_LEVIE_0006080)
456	J. Das email re: Box Dec Board Meeting (BOXEM_LEVIE_0006270- BOXEM_LEVIE_0006271)
458	Open Text Annual Report – 2011 (OTEX001777002 – OTEX001777165)
459	Feature Matrix Livelink Enterprise Server Solutions, Revised 8/8/04 (OTEX000797244 – OTEX000797253)
460	Open Text Corporation Form 10-K for FYE 6/30/12 (OTEX000513210 – OTEX000513335)
461	Power Point – Livelink ECM Price Calculator v7.0.x – Overview 12/06 (OTEX000298377 – OTEX000298445)
462	Overview of Livelink Packages (OTEX000214792 – OTEX000214816)
463	Open Text Annual Report – 2010 (OTEX003211721 – OTEX003211876)
464	Open Text Annual Report – 2013 (OTEX007541731 – OTEX007541884)
465	Feature Matrix Livelink Enterprise Server Solutions, revised 8/8/04 (OTEX004615476 – OTEX004615485)
466	U.S. Patent Application No. 61/697,511 (OTEX200105423 – OTEX200105448)
467	U.S. Patent Application No. 61/653,876 (OTEX200105154 – OTEX200105177)
468	Spreadsheet – Livelink ECM Package Feature Matrix 20060321 (OTEX001157428)
469	Spreadsheet – Livelink ECM Package Feature Matrix (2006-02-14) (OTEX001888028)
470	Spreadsheet – Product Definitions Livelink Infrastructure Products QuickReference (OTEX002674614)
471	Spreadsheet – CrossSell Analysis CEM 20120829 (OTEX003290003)
472	Spreadsheet – Livelink ECM Package Feature Matrix 2007-06-22 (OTEX004259656)
473	Spreadsheet – Product Definitions – Livelink Enterprise Server Packages QuickReference Spreadsheet (OTEX004486319)
474	Spreadsheet – Gartner Livelink Infrastructure Package Reference Chart (OTEX004613454)
475	Spreadsheet – Livelink Package License Revenue Breakdown & Royalty Calculations (2005-08-01) (OTEX004632819)
477	Spreadsheet – Copy of Livelink ECM Package Feature Matrix (2007-06-22) (OTEX004872216)

Case No. C 13-04910 JD   18.   **PROFFER OF EVIDENCE ON DAMAGES**

TX	DESCRIPTION
482	Email from A. Levie re: Box/SAP (BOXEM_LEVIE_0002388 – BOXEM_LEVIE_0002389)
495	Power Point – BoxSKOFY15 – BOX0426702 – BOX0426739)
1812	Report: Price Proposal for Nimbus, Bates OTEX200109160-9175 (Howatson Depo Ex. 1812)
2701	Power Point – Open Text Cross Patent License Renewal (OTEX002834539 – OTEX002834584) (Unruh Ex. 2701)

D.   Open Text's Interrogatory Response on October 15, 2014 identified the date of the hypothetical negotiation between the parties

On October 15, 2014, in response to Interrogatory 18, which was served on September 15, 2014, Open Text identified its evidence concerning the date of the hypothetical negotiation between the parties. (Ex.16, Pl.'s Resp. to Third Set Interrogs. at 8-9.)

The following trial exhibits are cited in that interrogatory response and relevant to Open Text's damages:

TX	DESCRIPTION
60	Spreadsheet - Enterprise Acct Analysis (supporting_analyses_for_pi.) (BOX0438390) (Lemenager Depo Ex. 60)
179	Spreadsheet – Users Installed on Windows Sync vs. Mac Sync (BOX1087347) (Lemenager Depo Ex. 179)
182	Spreadsheet – Actions Across Box Users Per Month (BOX1087344) 178 – (Lemenager Depo Ex. 178) 182 – (Galea Depo Ex. 182)
255	IBM and Open Text – License Agreement (OTEX004245873 – OTEX004245891)
262	Alfresco Settlement Agreement with Open Text S.A., dated 9/29/2014(OTEX200229709 – OTEX200229720)
287	Spreadsheet – Box_Projections (2007-2008) (BOX0037920)
2701	Power Point – Open Text Cross Patent License Renewal (OTEX002834539 – OTEX002834584) (Unruh Ex. 2701)

E.   Open Text Designated Evidence in Box's Interrogatory Responses That is Relevant to Damages

Open Text designated the following Box interrogatory responses for trial, which provide additional evidence of damages:

- Interrogatory No. 13: For each month since June 2006, identify the number of

1   times that each of your customers, by user, used each Feature of the Accused

2   Instrumentalities for which you can track usage.

3   (Ex. 17, Box's Resp. to Pl.'s Third Set of Interrogs. (Nos. 13-19) 5:12-

4   77:7, Oct. 14, 2014 (addressing individual user and customer use of the

5   accused products and features).)

6   • Interrogatory No. 14: For each month since May 2014, for each of your customers

7   and each user associated with that customer, identify the number of times the Box

8   Android application has been used to download files from Box, open those files in

9   local applications on the Android device, and synchronize any changes made to the

10   files in the local applications with the file store remotely in the Box database.

11   (Ex. 17, Box's Resp. to Pl.'s Third Set of Interrogs. (Nos. 13-19) 77:10-

12   78:13, Oct. 14, 2014 (addressing usage of specific functionality of the Box

13   Android application).)

14   • Interrogatory No. 15: Describe all valuations by or on behalf of you of each

15   Feature of the Accused Instrumentalities, including any metrics used to determine

16   value.

17   (Ex. 17, Box's Resp. to Pl.'s Third Set of Interrogs. (Nos. 13-19) 78:15-

18   79:15, Oct. 14, 2014 (addressing all valuation of each feature of the

19   accused products including metrics to determine value).)

20   • Interrogatory No. 16: Describe all valuations by or on behalf of you of each

21   Feature of the Accused Instrumentalities, including any metrics used to determine

22   value.

23   (Ex. 17, Box's Resp. to Pl.'s Third Set of Interrogs. (Nos. 13-19) 79:17-

24   81:14, Oct. 14, 2014 (addressing substance of communications with

25   potential financers concerning Box's losses, potential profitability, and

26   pricing strategy).)

27   • Interrogatory No. 18: Identify, for each week since the week beginning May 28,

28   2006, paid users and unpaid users of each Accused Instrumentality during the

preceding seven days, including identifying the customer name and Accused

Instrumentality for each user.

> (Ex. 17, Box's Resp. to Pl.'s Third Set of Interrogs. (Nos. 13-19) 82:20-
> 83:21, Oct. 14, 2014 (addressing identification of each paid and unpaid
> user or customer by accused instrumentality).)

- Interrogatory No. 19: Describe all pricing models that you have employed
  concerning the pricing of any of the Accused Instrumentalities, including, for each,
  the amounts charged under the pricing model, the Accused Instrumentalities for
  which the pricing model applied, and the time period(s) during which the pricing
  model was used.

> (Ex. 17, Box's Resp. to Pl.'s Third Set of Interrogs. (Nos. 13-19) 83:23-
> 86:21, Oct. 14, 2014 (addressing descriptions of pricing models for the
> accused products).)

F.   Ms. Holt's Expert Report Provided Further Notice of Open Text's Evidence of Damages

Open Text will not call Ms. Holt to testify concerning damages at trial, but the contents of Ms. Holt's expert report put Defendants on notice regarding Open Text's evidence of damages. For example, the following sections in Ms. Holt's report identify evidence that will be presented at trial that is relevant to damages and the parties' bargaining positions during the hypothetical negotiation:

- Overview of Open Text's business (Ex. 21, Holt Report at 4-9.)
- Overview of Box's and Carahsoft's businesses and customers (Ex. 21, Holt Report at 9-31.)
- Discussion of competition within the Enterprise Information Management marketplace (Ex. 21, Holt Report at 31-36.)
- Identification of facts relevant to the bargaining position of Open Text and Box during the hypothetical negotiation (Ex. 21, Holt Report at 89-90.)

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Case No. C 13-04910 JD   21.   **PROFFER OF EVIDENCE ON DAMAGES**

V.   DAMAGES THEORIES OPEN TEXT INTENDS TO OFFER AT TRIAL

A.   Open Text Has More Than Enough Evidence of Damages to Allow the Jury to Make a Damages Award

In accordance with the Federal Circuit's holding in *Apple, Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1327-28 (Fed. Cir. 2014), Open Text will offer more than enough evidence of damages at trial for the jury to determine an award of damages in accordance with Jury Instruction Nos. 35 and 36. Based on that evidence, the fact finder is required to determine a reasonable royalty based on the evidence. *Id.*

B.   Open Text's Damages Presentation Will Conform to the Law on Damages, the Jury Instructions, and Its Discovery Disclosures

Open Text's damages proofs will conform to the damages disclosures identified in this proffer, which were timely disclosed to Defendants during the fact discovery period. Rather than advocate that the jury to select (1) a specific royalty rate and base, (2) a specific fixed number of dollars per unit sold, or (3) a specific lump sum, Open Text will present evidence concerning each of the factors set forth in Instruction No. 36. From the presented facts, the jury will be able to carry out its duty under Instruction No. 35. The jury will be able to select the type of royalty that is appropriate in this case. If the jury selects a percentage royalty, the jury will be able to determine the appropriate base from the presented evidence. All sales to Box users infringe because each sale is capable of infringement whether or not the user actually downloads the infringing feature, Box Edit. The jury will be able to apportion this full base by identifying the number of Box users who specifically elected to download the infringing feature. The jury will then be able to determine a royalty rate based on the presented facts, including the ratio of the value of comparable Open Text editing features to the full value of the Open Text products.

To the degree that further apportionment is necessary, the jury may determine, based on offered factual evidence, that "the value of the patented feature could not be separated out from the value of the whole product" in accordance with the jury instruction. In this situation, the jury would not need to apportion further based on the fourth paragraph of Instruction No. 35. Alternatively, the jury would be able to determine damages based on a fixed number of dollars

1   per unit sold based on the third paragraph of Instruction No. 35. The offered facts, as organized

2   around the factors of Instruction No. 36, provide the jury with the number of total infringements

3   and the number of infringers that specifically downloaded Box Edit. The jury would then be able

4   to determine the value of each infringing unit based on Open Text pricing of similar technology.

5   Further, the jury will be able to determine a one-time lump sum covering past and future

6   sales based on the number of total infringements and the number of users that specifically

7   downloaded Box Edit. Based on Open Text's pricing for comparable technology and Box's need

8   for Box Edit, the jury would be able to determine an appropriate lump sum. Accordingly, based

9   on the facts, the jury will be able to satisfy its obligation under Instruction No. 35 to determine

10 "what royalty would have resulted from the hypothetical negotiation." Open Text organized its

11 responses to Box's interrogatories such that they match Instruction No. 36. Open Text

12 specifically directs the Court to Open Text's responses to Interrogatory No. 6, which matches

13 Jury Instruction No. 36, and were served well in advance of the close of fact discovery on

14 September 24, 2014.

15   To be clear, neither counsel, Open Text's experts, nor Open Text's witnesses will

16 advocate that the jury apply a particular royalty or base to this case. The witnesses will present

17 facts relevant to Instruction No. 36. Counsel will explain how those facts relate to the jury

18 instructions. The jury will be empowered, as explained in *Apple v. Motorola*, by the Court's Jury

19 Instructions Nos. 35 and 36 to weigh the facts and apply them in accordance with law to

20 determine the type and amount of damages to award.

21   **1.   Identification of Exemplary Damages Evidence By Topic**

22   In accordance with Jury Instruction Nos. 35 and 36 and the *Georgia-Pacific* factors, Open

23 Text identifies the following exemplary evidence, which it intends to introduce at trial, and which

24 is relevant to each of the damages categories identified below:

25

Usage and Base	Importance of Technology	Apportionment	Relative Bargaining Positions and Competition
BOX0034554 (TX741)	BOX0015248 (TX123)	OTEX2199600 (TX442)	BOX0027275 (TX12)

BOX0438390 (TX60)	BOX0418578 (TX218)	OTEX4632819 (TX475)	BOX0733882 (TX423)
BOX1071600 (TX11)	BOX0438390 (TX60)	BOX0032171 (TX21)	BOX1071320 (TX20)
BOX0027396 (TX256)	BOX1071600 (TX11)	BOX0034554 (TX741)	BOX1071600 (TX11)
BOX0037765 (TX424)	BOXEM_LEVIE_14388 (TX344)	BOX0194270 (TX749)	TX450
BOX0438238 (TX223)	OTEX200109160 (TX1812)	BOX0438390 (TX60)	OTEX00228130 (TX813)
BOX1088347 (TX494)		BOX0228130 (TX432)	OTEX200109138 (TX1811)
TX496		OTEX200109138 (TX1811)	OTEX200109160 (TX1812)
TX060		OTEX200109160 (TX1812)	OTEX200112266 (TX313)
TX161		OTEX001088347 (TX494)	OTEX000924427 (TX419)
TX179		OTEX002346046 (TX390)	OTEX000513210 (TX460)
TX223		OTEX001941944 (TX498)	OTEX200109138 (TX489)
		OTEX000513211 (TX460)	OTEX200109242 (TX490)
		OTEX002199600 (TX442)	OTEX200109994 (TX491)

Because of the short notice associated with the Court's order on this proffer of evidence and the Court's sealing requirements for confidential documents, Open Text will lodge these exhibits with the Court after receiving guidance from the Clerk.

2. Exemplary Examination Topics for Witnesses With Knowledge of Damages

In accordance with its discovery disclosures, the *Georgia-Pacific* factors, and Jury Instruction Nos. 35 and 36, Open Text intends to present testimony from the following witnesses on the following topics:

a. Adam Howatson

- Value of comparable technology sold by Open Text

- Pricing of comparable technology sold by Open Text

- Competition between Box and Open Text

- Ability to separate the value of the patented feature from the value of the whole Box service

1   • Growth rate

2   • Lifetime value

3   • Margins

4   • Retention rate

5   • Convoyed sales

6   • Open Text willingness to license

7   • Open Text licensing history and policy

8   • Portion of selling price attributable to analogous inventions

9   **b.   Trevor Unruh**

10   • Open Text patent licensing history and policy

11   **c.   Nic Carter**

12   • Value of comparable technology sold by Open Text

13   • Pricing of comparable technology sold by Open Text

14   • Importance of patented technology to Open Text products

15   • Competition between Box and Open Text

16   • Ability to separate the value of the patented feature from the value of the whole

17   Box service

18   • Growth rate

19   • Lifetime value

20   • Margins

21   • Retention rate

22   • Convoyed sales

23   • Open Text willingness to license

24   • Open Text licensing history and policy

25   • Open Text use of the patented technology

26   • Advantages of the patented technology over other methods

27   • Portion of selling price attributable to analogous inventions

28   • Open Text patent licensing history and policy

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d.   Griffin Dorman

2

- Importance of patented technology to Box customers

3

- Demand for patented technology by Box customers

4

- Importance and demand for patented technology by Box corporate customers

5

- Issues with Box's old technology and the need for another technology option

6

e.   Dylan Smith

7

- Usage of the patented technology

8

- Number of users

9

- Growth rate

10

- Lifetime value

11

- Margins

12

- Retention rate

13

- Box ability to pay a royalty at the time of the hypothetical negotiation

14

- Box's pricing and losses

15

- Value of corporate customers

16

f.   Sebastien Lemenager

17

- Usage of the patented technology

18

g.   Chris Yeh

19

- Ability to separate the value of the patented feature from the value of the whole

20

  Box service

21

- Demand for patented technology by Box customers

22

h.   Aaron Levie

23

- Box's business model for growth and the associated business risks

24

- Box's pricing model that results in losses

25

- Benefit to Box realized through high-user growth

26

- Need for rapid user growth

27

i.   Whitney Bouck

28

- Competition between Box and Open Text

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1   • Value of corporate customers

2   **VI.   CONCLUSION**

3   Open Text respectfully requests the Court to accept this proffer of evidence and allow it to

4   proceed with its presentation of damages evidence at trial.

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6   Dated: January 31, 2015   COOLEY LLP

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8   *s/ Orion Armon*
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